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No. 88-1374

In The

Supreme Court of the United States

October Term, 1988

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

ISSUES

The ultimate issue in this case is whether plaintiff and appellant The Jimmy Swaggart Ministries (formerly known as "Jimmy Swaggart Evangelistic Association", and referred to herein and in the California courts as "ministries" or "JSM") is entitled to refund of taxes paid under the California Sales and Use Tax Law for the period April 1, 1974 through December 31, 1981,[1] (California Rev. & Tax. Code,

[1] Sometimes called the "period in issue" or "audit period." (All references are to this period unless otherwise indicated.)

[hereinafter "R & T Code"] § 6001, et seq.) on sales made at evangelistic meetings or "crusades" in California[2] and on sales by mail order direct from its Louisiana headquarters to California purchasers.

The only federal issue presented in the complaint and the only issue properly before this Court is whether such tax was "a violation of the First Amendment to the Constitution of the United States, made applicable to the State of California under the provisions of the Fourteenth Amendment . . . " (CT 4; Complaint, par. 12.)[3]

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[2] The defendant, California State Board of Equalization (hereinafter sometimes "SBE" or "board"), asserts that the mail order sales are subject to the *use* tax (see Cal. Code Regs. tit. 18, § 1620, ¶¶ (a)(2)(g) and (b)(1)); and the crusade sales are taxable under the *sales* tax *or* under the use tax if the sales tax is inapplicable. (R & T Code, §§ 6051, 6201.)

[3] The parties stipulated:

> "Exhibits '1' and '2' to the Complaint constituted the argument and evidence presented administratively on its Petition for Redetermination and Claim for Refund. The Complaint herein (paragraph 12) bases JSM's claim to Refund upon the grounds stated in exhibit '1' to the Complaint alleging, 'In summary, it is alleged that California cannot impose a sales or use tax upon distribution of Bibles, religious books, religious tapes and other religious materials in the State of California because to do so would constitute an interference with the free exercise of religion as set forth in Article I, Section 4 of the California Constitution, and because it is a violation of the First Amendment to the Constitution of the United States, made applicable to the State of California under the provisions of the Fourteenth Amendment to the Constitution of the United States.' " (Joint Appendix [hereafter JA] 59.)

At trial and on appeal JSM attempted to add a number of other issues not contained in its claim for refund or in its complaint.[4] It has abandoned most of these. However, in Brief for the Appellant (16-20) JSM continues to assert lack of "Nexus" (a due process commerce clause requirement before a state can assert jurisdiction over a taxpayer) even though the California courts held that issue was not properly before them and declined to rule thereon, and SBE had no opportunity to discover or present evidence on this issue to the court.

---

[4] A commerce clause argument (abandoned) before appeal that a sales tax cannot be placed on an interstate transaction because it is cumulative and discriminatory was included in plaintiff's trial brief (CT 48-49). A "nexus" argument based on commerce clause and due process was made in a supplemental memorandum filed on the first day of trial. (Supp. CT 1-6.) SBE's motion in limine to exclude evidence not relevant to the First Amendment issue pleaded in the complaint was granted. (Evidence pertaining to nexus was to be considered as an offer of proof.) (RT 14.) Appellant's motion after the close of SBE's case to reconsider exclusion of the nexus issue and allow amendment of the complaint was denied, the court observing that failure to raise the issue until at or just before trial deprived SBE of the opportunity to do discovery with respect thereto. (RT 229-231.)

JSM on appeal asserted for the first time arguments purportedly under the Ninth and Tenth Amendments to the United States Constitution which it included in question 1 of the Jurisdictional Statement here but apparently has abandoned by failure to argue these grounds in the Brief for the Appellant filed herein.

Appellant has also pleaded violation of the *California Constitution* (art. I, § 4) counterpart of the First Amendment, but has not mentioned it on appeal, and it does not raise any federal question.

Although JSM's claim for refund was based solely upon alleged "interference with [JSM's] 'free exercise' of religion" (JA 12; also 34, 11-16), and no facts were presented to the administrative body suggesting any constitutional entanglement, (see fn. 3, *supra*), JSM offered evidence and argued "entanglement" at trial, over objections of SBE that the issues before the court were limited to those set forth in the claim for refund (JA 64-65).

Both the trial and appellate courts ruled under the facts presented in accordance with California rules as to burden of proof regarding evidence and appellate review, that JSM had not carried its burden of proving excessive entanglement which violated the Establishment Clause. (See JA 245-252.) Here, contrary to these rules, JSM continues to assert the evidence most favorable to it which in the face of conflicting evidence was rejected by the California courts as a basis for its claims of violation of the Establishment Clause; JSM here also improperly relies on claimed "facts" not presented as evidence to the California courts. Any review by this Court of JSM's Establishment Clause contentions should be based upon the same evidence and rules before the California courts, i.e. if there is substantial evidence in the record (ignoring all conflicting evidence to the contrary) which supports the California courts' determination that JSM failed to establish any violation of the Establishment Clause in the application of the tax in issue, this ruling should be affirmed.

STATEMENT OF THE CASE

A. Procedural Facts

From 1975[5] through 1981, JSM sold tangible personal property at "crusades" in California.[6] About 1980, SBE discovered that JSM had been retailing tangible personal property at its crusades in California without registering as a seller or reporting and paying tax on its sales to California customers.[7] (*Jurisdictional Statement* [hereinafter JS], APP. E-1.) An audit was thereafter commenced by

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[5] The audit here in issue goes back to 1974; however, crusade meeting dates in California during 1974 were not available (JA 19).

[6] In response to SBE's interrogatory asking for the percentage breakdown of sales of (a) bibles, (b) sermon booklets, (c) study manuals, (d) gospel piano/organ courses, (e) other books, (f) audio recorded music, (g) audio recorded sermons, or (h) "other tangible personal property (identify and describe)", JSM furnished a schedule of nationwide "MERCH SALES" for 1979 to mid-1982 of "Albums" $3,019,456, "Tapes", $4,202,980, "Books", $? 896,519 and "Other", $8,052,564, suggesting that from these figures one could estimate California percentages and "This is the best and only available method of determining distributions by items in California." (JA 201-02.) By examination of JSM's solicitation materials in its "Evangelist" magazine (Trial Exhibits 8-15) and that which was directly mailed to California (JA 121-28), it appears that JSM sold mugs, bowls, plates, pen and pencil sets, bud vases, communion cups, candlesticks, a Roman coin (replica), prints of religious scenes, T-shirts with JSM logo, replicas of the Crown of Thorns and Ark of the Covenant (CT 20), as well as instrumental music, organ and piano lessons, vocal music; taped talks and books (on religious-morals-family related subjects), as well as bibles, sermons and a biography of Jimmy Swaggart.

[7] It was in a second letter to JSM's attorneys requesting registration (after the first request had been ignored) that a

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SBE during which the auditor asked about the mail order sales which he discovered; the question was reviewed by SBE's legal department and in July 1981, counsel for JSM was advised that the available facts indicated that there was sufficient nexus to tax the mail order sales (JA, APP. F-1 to F-4.) No assertion was made by JSM that there was no nexus to tax the mail order sales until half a decade later, at or just before trial in 1986. Until 1986, JSM's consistent and sole position through its attorney was that *any* taxation of JSM (or registration by JSM as a seller) was an unconstitutional prohibition of the free exercise of religion by JSM under the First Amendment as interpreted by *"Murdock"* and *"Follett"* (see Petn. for Redetermination [JA 11], Claim for Refund, [JA 34], and Complaint, [JA 37]).

The parties have stipulated, among other things, that:

> "JSM cooperated with SBE and the parties agreed, based upon JSM records available, that JSM sold for use in California tangible personal property for the period April 1, 1974, through

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business tax representative added by hand at the end a request for an immediate response which pointed out that "any California sales at this time are strictly illegal and the officers of the organization are guilty of a misdemeanor." JSM appears to continue to assert that this statement constituted a "prior restraint" on its practice of religion, even though in May 1986, it conceded that it made sales in California which were taxable. (JA 62, ¶ 5.) No criminal action was ever taken by the Board for failure to register; nor has JSM initiated proper proceedings under California law (Writ of Prohibition) to contest the legality of any registration requirement. Registration is totally irrelevant to this tax refund proceeding, and (especially since JSM's concession that it made taxable sales) (no fee) registration requirements are clearly constitutional. (JA 242-43.)

December 31, 1981, measured by payment to JSM of $1,702,942.00 for mail order sales from Baton Rouge, Louisiana and $240,560.00 for crusade merchandise sales in California." (JA 58, ¶ 4.)

"Exhibits '1' and '2' to the complaint constituted the argument and evidence presented administratively on its Petition for Redetermination and Claim for Refund. The complaint herein (paragraph 12) bases JSM's claim to Refund upon the grounds stated in exhibit '1' to the complaint, alleging, 'In summary, it is alleged that California cannot impose a sales or use tax upon distribution of Bibles, religious books, religious tapes and other religious materials in the State of California because to do so would constitute an interference with the free exercise of religion as set forth in Article 1, Section 4 of the California Constitution, and because it is a violation of the First Amendment to the Constitution of the United States, made applicable to the State of California under the provisions of the Fourteenth Amendment to the Constitution of the United States." (JA 59, ¶ 12.)

After the above-mentioned Petition for Redetermination and Claim for Refund were denied, this action was filed to recover the approximately $15,000 per year of tax plus interest paid for the period April 1, 1974, through December 31, 1981.

B. Substantive Facts

The parties have stipulated to the following:

"For the period April 1, 1974, through December 31, 1981, (hereinafter 'the period') JSM was involved in transactions with California residents which were 'sales' by JSM and 'purchases' by those residents of 'tangible personal property' as those terms are defined by the California Sales and Use Tax Statutes. These

> 'sales' and 'purchases' of 'tangible personal property' in California took two forms: (1) direct 'sales' at evangelistic crusades conducted in California by JSM, which accounted for $240,560 received by JSM during the period; and (2) mail order 'sales' to people at addresses in California which accounted for $1,701,942 received by JSM during the period." (JA 61-62, ¶ 3.)
>
> ". . . .
>
> "The tangible personal property referred to in paragraph 3 above was classified on JSM's accounting records as 'albums', 'tapes', 'books', or 'other.' The specific items are described in copies of the 'Evangelist' and 'Instant Order' brochures described in paragraph 6. Pursuant to the April 1986 Procedural Stipulation to be filed herein, JSM no longer asserts non-taxability with respect to the items described in paragraph 13 thereof."[8] (JA 62, ¶ 5.)

JSM's Evangelist magazines and Instant Order brochures describe the merchandise it sold. (Exhibits 8 to 15, 43 [JA 121-28].) Those exhibits also contain mail order envelopes showing *fixed* prices for each item of merchandise offered for sale. They show that JSM was *selling for fixed prices* the merchandise advertised there. These solicitation materials do not offer to give away or "distribute" any item in issue free or without full payment of the specified price.[9]

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[8] JSM thus has conceded that California properly taxed items "which JSM says do not have specific religious-message content, i.e., T-shirts with JSM logo, mugs, bowls, plates, replicas of crown of thorns, ark of the covenant, Roman coin, candlesticks, Bible stand, pen and pencil sets, prints of religious scenes, bud vases, and communion cups, . . . " (JA 59-60, ¶ 13.)

[9] JSM admitted also that normally only Jimmie or Donnie Swaggart had authority to reduce prices or give away merchandise

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JSM did not simply disseminate religious messages to "religious adherents." It sold to *anyone* who paid the price[10] T-shirts, pens and pencils, various dishes and replicas, instrumental music, and piano lessons; as well as books, tapes, and records containing religious and other information which, like the *Minneapolis Star* (460 U.S. 575) newspapers, have some First Amendment protection. While most of appellant's messages pertain or refer in some way to the life of Christ as contained in the New Testament or other parts of the Holy Bible, they include subjects covering many aspects of living, including alcoholism, homosexuality, the lives and activities of celebrities such as Jerry Lee Lewis, Jimmy Swaggart himself, Elvis Presley (exh. 13, August 1979, p. 14), personal finances, photo album-calendar (exh. 14, January 1980, p. 23; September 1980, p. 41), punishment and government (exh. 15, June 1981, p. 11).[11] JSM also

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(JA 204); gifts of merchandise at crusades were insignificant (JA 203); and "[a]ny give aways [of mail order merchandise] would occur when a visiting minister might be touring the facility and Jimmy Swaggart might offer him a bible as a gift. Other than the giving of items to visiting ministers, prices were not reduced below cost." (JA 204.)

[10] JSM points to no evidence in the record suggesting that it sold only to "adherents" following its particular religious tenets or did not sell to anyone who tendered the asking price.

[11] Here, Jimmy Swaggart says:

> " . . . human government was instituted by God Himself. Christians are commanded in the New Testament to pay taxes and to support government (Rom. 13:1-7; 1 Pet. 2:13-17). Law, as a part of

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gives advice on marriage and divorce. (*Id.* at 21-22, 24, including the humor in marriage.) JSM's publications also advertise for employees (*id.* at 28, 35, seeking proofreader, typist, attorney, and press operator) and publicized the broadcast over local television stations which show appellant's programs – including five local California cable channels. (*Id.* at 15.) Much of the merchandise offered by JSM for sale was music (both instrumental and vocal). (JA 128.) For example, in 1974 every Evangelist magazine offered music and nothing else for sale, except in August JSM also advertised (at an 80% discount) an "overstocked" bible. (Exh. 8.)

"The materials distributed at the crusades are identical to materials distributed through the mails." (Brief for the Appellant [hereinafter B of A 7].) None of the merchandise sold was "distributed directly for use in other activities of JSM." (JA 203, 204.)

The above shows that JSM here seeks First Amendment immunity of its sales of instrumental music, piano and organ lessons, as well as vocal music and a variety of written messages, *not* only "books, pamphlets, tapes, and

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> government, will continue as the rule of right in all eternal societies. If the right to govern is based upon the best public interest, then the right and duty to use any necessary means to attain this end must be recognized by all. It is somewhat absurd to believe that rulers have a right to govern, yet have no right to use the necessary means to enforce that government."

Apparently Jimmy Swaggart believes "Christians" should pay taxes (the "life blood" of government), but JSM need not contribute its share.

records with specific doctrinal and worship related content" (as it claims, B of A 21.)

C. All Facts Should be Construed to Support the Decisions Below and all Conflicting "Facts" Asserted by JSM (Except Relevant Undisputed Facts in Evidence) Should be Rejected.

Under California law applicable here, all factual disagreements must be resolved in favor of appellee SBE; a judgment is presumed correct; where the record is silent "all intendments and presumptions are indulged to support it." (*Kearl v. Board of Medical Quality Assurance* (1987) 189 Cal.App.3d 1040, 1051.)

> "It is well established that . . . the determination of [a] factual issue by the trial court upon conflicting evidence is conclusive upon an appellate court. (*People v. Puritan Ice Co., supra,* 24 Cal.2d at p. 651.)" (*Burroughs Corp. v. State Bd. of Equalization* (1984) 153 Cal.App.3d 1152, 1166.)
>
> "When a court's finding is attacked on the ground that it is not supported by the evidence, the power of an appellate court begins and ends with the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding or verdict. Questions of credibility must be resolved in favor of the factfinder's determination, and when two or more inferences can reasonably be drawn from the evidence, a reviewing court may not substitute its deductions for those of the trier of fact. If on any material point the evidence is in conflict, it must be assumed that the court resolved the conflict in favor of the prevailing party. (See also *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925 [101 Cal.Rptr. 568, 496 P.2d 480]; *Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784 [59 Cal.Rptr. 141, 427 P.2d 805].) . . . "

(*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 62.)

Many of the assertions claimed in Brief for the Appellant (35-45) to show unconstitutional entanglement with religion are contradicted and impeached (primarily by documentary evidence), are outside the record or are not relevant. JSM fails to mention the evidence which supports the California courts' holdings that JSM failed to show unconstitutional interference with free exercise of religion or entanglement violating the establishment clause.

The California Court of Appeals, after reviewing the evidence, specifically found that,

> "Neither Ministries' difficulty in establishing past 'sales' from its books due to its past accounting practices nor the requirement of future record-keeping involve the government with an excessive entanglement with religion so as to violate the establishment clause." (JA 252; footnote omitted.)

The California Court of Appeal noted that the evidence established that "Ministries had a sophisticated accounting staff and had recently computerized its accounting and that Ministries in its own books and for purposes of obtaining a federal income tax exemption segregated 'retail sales' from 'donations.' "[12] (JA 251-252.)

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[12] In its books, Ministries had at least six categories for donations ('crusade,' 'radio,' 't.v.,' 'mission,' 'radio stations' and 'other') and at least four categories for sales ('retail,' 'wholesale,' 'meeting & crusade,' and 'master charge'). Ministries' books also had a category for 'sales Fgt. shipping.'

In its 1980 application for recognition of an exemption from federal taxes under section 501(c)(3) of the Internal Revenue Code, Ministries stated it had ' . . . four primary sources of

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The brief for appellant herein regularly goes outside the record to support its position.[13]

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financial support; [¶](1) Donations are received by collections made during the religious service conducted three (3) times per week at the Church . . . and during special evangelistic services conducted worldwide in municipal auditoriums; and through contributions solicited from those attending services in Baton Rouge, Louisiana and the general public either by direct personal appeal, by radio and television programs, by appeals made in the monthly publication 'The Evangelist', or other direct mail solicitation. [¶](2) Monies received from the sale of copyrighted religious material such as books, pamphlets, records and tapes. [¶](3) Fees received from the sale of radio broadcast time to religious programmers sharing similar beliefs with the [Ministries]. [¶](4) Gift annuities, bequests, donations in trust, and other gifts received through estate planning guidance and other fund-raising efforts established by [Ministrie's] Stewardship Department."

In its 1981 filings for a federal income tax exemption, Ministries distinguished between 'gifts, grants, and contributions received' and 'gross receipts from admissions, merchandise sold or services performed, or furnishing of facilities in any activity that is not a business unrelated to the organization's charitable, etc. purpose' for the years 1977 through 1980, distinguished between the 'gifts, grants, and similar amounts received' and 'gross sales minus returns and allowances' for 1981, and attached comments separately addressing 'the sales of religious books, records, and tapes' and 'donations.' (JA 251-52, fn. 17.)

[13] Factual statements by appellant which are not supported by specific citations to the evidence before the trial court should be ignored. For example, no evidence was presented concerning appellant's present assertions that it made full and complete payment for each and every state service provided to it (B of A 5) and suggesting that California does not tax sales by other religious organizations (B of A 40), both of which are wrong.

Further, the Appendix attached to Brief for the Appellant which purports to describe state statutes relating to sales and use taxes should be ignored, not only because it is irrelevant (JSM concedes that California is the only state which taxed it during the period in issue – [B of A 13-14]), but it is also inaccurate and misleading at least as it applies to California. (For example, contrary to implications on page A-16, California requires no fee for registration; the primary tax in issue here is the use tax which is on the buyer, and federal cases have held that the legal incidence of the sales tax is also on the buyer for federal purposes even though California law does not require that the sales tax be passed onto the buyer: the sections discussing separate advertising and separate statement of taxes were repealed in 1979. The table 5, p. A-35, is misleading: The State Board of Equalization has asserted that both the sales and use tax apply; published California appellate court decisions uniformly uphold the validity of the use tax; the dictum in the *Institute* case re sales tax ((1985) 166 Cal.App.3d 1093, at 1105-06) was superseded by the reasoning in this case. (JA 236-44.)

SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution states (in part), "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . " The state of California has not prohibited the free exercise of any religion by the imposition and collection of its sales and use taxes here in issue nor did the collection of this tax result in "establishment of religion."

The Brief for the Appellant (i) states the primary issue presented to be "whether the state may impose sales and use tax on the non-commercial distribution of religious materials by a religious ministry to its adherents for the purpose of advancing its religious doctrine." The clear answer under the First Amendment is that a state may do so as long as it does not establish a religion or prohibit the free exercise thereof. Here nothing the state has done has neither established nor prohibited the free exercise of any religion.

JSM's primary reliance throughout this case has been on the cases of *Murdock v. Pennsylvania* (1943) 319 U.S. 105 and *Follett v. McCormick* (1944) 321 U.S. 573. Those two cases involved criminal prosecutions for failure of ministers selling religious tracts as an integral part of their door-to-door ministry to pay before engaging in their religious activities flat license fees so large as to substantially prevent the itinerant ministers from buying food and shelter necessary to continue their ministry. Under these facts five members of this Court found an unconstitutional prior restraint to their freedom of speech and in effect a prohibition on the free exercise of their religion.

The *Murdock* and *Follett* decisions and subsequent cases have recognized that sales and use taxes as well as taxes on income, property, and room rental receipts are constitutional though imposed on the exercise of freedom of press, speech and religious activities, so long as they are general, secular and not discriminatory.

The California Sales and Use Tax in issue here is not a special tax on religion, but a general non-discriminatory tax on secular acts which has no prohibited constitutional effects. The sales and use taxes place *no* prior restraint on,

nor do they conflict or interfere with JSM's *practice* of religion. Unless JSM chooses not to collect tax reimbursement from its customers, its only burden is to calculate, report and pay the tax it collects as a small percentage of its sales receipts. The total burden imposed upon religion is no greater than that imposed by property and income taxes, including the federal income tax. Such burdens do not prohibit the free exercise of religion or entangle government in the religious activities to the extent that there is "establishment" in violation of the First Amendment.

The second question presented in the Brief for the Appellant (i), whether a state "may treat occasional religious worship services" there as "Nexus" is a commerce clause – due process issue neither decided by the courts below nor properly before this court. Its answer, however, is that any presence in the state *may be considered along with any other activities* in or connected with that state in determining whether there is sufficient "Nexus" to give a state constitutional jurisdiction to levy a tax or otherwise impose its laws upon a person. (Here even JSM's own admissions show much California activity beyond "occasional religious worship services".)

ARGUMENT

I

CALIFORNIA SALES AND USE TAX DOES NOT PROHIBIT THE FREE EXERCISE OF RELIGION

JSM has not asserted that the California Sales and Use Tax Law imposes a specific tax on religious activities, that it is administered or applied in a way directing it

against religious activities, that it is in any way discriminatory or denies equal protection of the laws to JSM or its "adherents", or is anything other than a non-discriminatory secular tax applied in an even-handed manner to all. JSM argues simply that as interpreted by *Murdock/Follett*, the free exercise and establishment clauses[14] of the First Amendment prohibit sales and use taxes on what it calls "Distribution of Religious Materials by Religious Bodies for the Purpose of Spreading Their Ideas." (B of A 21, heading II.)

The SBE believes that the opinion of the California Court of Appeal in this case contains a thorough and accurate analysis of the law (JA 228-44) (except for subsequent decisions of this court), which this court is requested to review.

A. The California Sales and Use Tax Law is a General "Gross Receipts" Tax Measured by the Sales Price of All Sales of Tangible Personal Property Made in or for Storage Use or Other Consumption in California.

The California Sales and Use Tax Law is in substance a double filter imposing either a "sales tax" (R & T Code, § 6051) or a "use tax" (*Id.*, § 6201) based upon the price of tangible personal property [purchased from "retailers"

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[14] It should be noted at the outset that while the *Murdock* (319 U.S. at 109-11, 115) and *Follett* (321 U.S. at 575, 577) cases included freedom of speech and press as an integral part of their discussion and basis for their decisions, JSM here has not complained that there is any interference with its freedom of speech or press by imposition of the California sales and use taxes on sales of its religious literature and messages here.

(*Id.*, §§ 6007, 6014, 6015)] for storage, use or other consumption in California (*Id.*, §§ 6008, 6009). "Retailer" includes anyone making more than two sales per year. (*Id.*, § 6019.) Thus, California (unlike many states which tax only sales of inventory of commercial businesses) imposes its sales and use taxes even though the seller or the purchaser may be charitable, religious, nonprofit, or state or local governmental in nature. (See *Union League Club v. Johnson* (1941) 18 Cal.2d 275, 278; *People v. Imperial County* (1946) 76 Cal.App.2d 572, 576-577; *Bank of America v. State Board of Equalization* (1962) 209 Cal.App.2d 780, 796-97.) It is applied uniformly in California to such sales and use of books, audio or video tapes and records or other tangible personal property even though such property conveys information protected by the First Amendment.[15] California's use tax is on the purchaser (R & T Code, § 6201); the sales tax is on the seller, but to the seller *may* be reimbursed (Cal. Civil Code, § 1656.1). Accordingly, anyone seeking to purchase the *Holy Bible* or copies of political or other speeches of any kind for use in California will normally pay either a use tax or sales tax reimbursement.

The storage and use which are taxable include the exercise of any right incident to the ownership of the property, and any keeping in California for any purpose except sale in the regular course of business or subsequent use solely outside of California. (R & T Code, §§ 6008, 6009.) Thus items (including books, records and tapes) purchased by Californians outside California normally become taxable immediately upon the purchaser

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[15] Newspapers and periodicals published at least four times a year are exempted. (R & T Code, § 6362.)

exercising any right of ownership (usually unwrapping or storage) as soon as the items are received in California, even though they may never be read or played and whether the purchaser's intended functional use is playing or reading it for entertainment or education, to find quotations or information to use in exercising one's own freedom of speech for political purposes, for worship of a particular religion, for musical background to other activities, or simply to impress visitors by displaying it as part of a collection.

JSM admits that the California sales and use taxes here are taxes for a secular purpose which neither advance nor inhibit religion. (JA 246.) They are the types of generally applicable, nondiscriminatory taxes which this Court said *could* be collected on sales of written expressions of free speech without violating the First Amendment (in *Minneapolis Star v. Minnesota Comm'r of Rev.*, (1983), 460 U.S. 575, 586), even as a license tax. (See also *Texas Monthly, Inc. v. Bullock* (1989) ___ U.S. ___, 109 S.Ct. 890 [plurality opinion]; *Times Mirror Co. v. City of Los Angeles* (1982) 192 Cal.App.3d 170, 182.)

Basically, under the California Sales and Use Tax Law, JSM and persons who purchase various religious materials from JSM are treated no differently from anyone else (including other nonprofit or governmental bodies as well as profit-making organizations) wishing to sell or purchase such materials for use in their exercise of freedom of religion or speech. SBE submits that persons who wish to use such uniformly taxed materials in exercise of their freedom of speech or religion are not exempted by the First Amendment from California's general uniform nondiscriminatory sales and use taxes.

II

RECENT CASES SHOW THAT JSM IS NOT EXCUSED BY THE *MURDOCK* AND *FOLLETT* CASES FROM PAYING CALIFORNIA SALES OR USE TAX.

JSM primarily asserts that *Murdock v. Pennsylvania* (1943) 319 U.S. 105 and *Follett v. McCormick* (1944) 321 U.S. 573[16] excuse it from paying the California Sales and Use Tax.

A. The *Murdock* and *Follett* Cases Are Distinguishable.

Murdock v. Pennsylvania. supra, 319 U.S. 105 involved Jehovah's Witnesses who went door-to-door distributing literature, playing a phonograph record, expounding certain of their religious views and soliciting people to "purchase" certain religious books and pamphlets. (*Id.* at 106-107.) They were criminally prosecuted and convicted for failure to obtain a license for a fixed fee required before any persons could solicit orders for goods or merchandise of any kind. (*Id.* at 106.) The court observed that hand distribution of religious tracts is an integral part of an age old form of missionary evangelism used on

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[16] JSM cites (B of A 8, 30) an obsolete Attorney General Opinion (No. 79-524) which was not followed by SBE in administering the Sales or Use Tax Law (JA 26), is inconsistent with subsequent judicial determinations discussed in this brief and was limited to its facts. (JA 244, fn. 14; *Institute in Basic Youth Conflicts, Inc. v. State Bd. of Equalization,* [hereinafter *"Institute"*] (1985) 166 Cal.App.3d at pp. 1106-1107, fn. 4.) Its reasoning is clearly wrong under current authorities; it should be rejected for all purposes here. It does *not* represent the position of the Attorney General.

a large scale by various religious sects whose colporteurs (ministers) carry the gospel to thousands upon thousands of homes and seek through personal visitation to win adherence to their faith. This was the manner largely used by the Jehovah's Witnesses whose colporteurs are specially trained and their qualifications equal those of preachers. (*Id.* at 109-110.) The Supreme Court held *only* that the preaching of the gospel through integrated personal visitations and distribution of religious literature is a religious practice with the same constitutional protection as more orthodox religious practices. It limited the single issue before it to the constitutionality of an ordinance which required such religious colporteurs to pay a flat license tax as a condition precedent to and *prior restraint* upon the practice of their religion (*Id.* at 110), which prohibited the free exercise of their religion and violated their freedom of speech. The *Murdock* court noted that the tax in issue was a "flat license tax, the payment of which is the condition of the exercise of these constitutional privileges." (*Id.* at 112.)

Going on, the court stated:

> " '[The tax involved] is a license tax – a flat tax imposed on the exercise of a privilege granted by the Bill of Rights.' A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 56-58), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. *Id.*, p. 47 and cases cited. A license tax applied to activities guaranteed by

the First Amendment would have the same destructive effect. . . . " (*Id.* at 113.)[17]

The *Murdock* decision also observed that the license tax in issue was fixed in amount and unrelated to the scope of activities or their realized revenues. (*Ibid.*) The "inherent vice and evil of this flat license tax," which was "collected as a condition of the pursuit of activities whose enjoyment is guaranteed by the First Amendment" was that it "restrains in advance those constitutional liberties of press and religion. . . ." (*Id.* at 114.)

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[17] The *McGoldrick* rule relied on in *Murdock* was overturned in 1977 by *Complete Auto Transit, Inc. v. Brady* (1977) 43 U.S. 274 (see JA 238-39). Brief for the Appellant does not mention the argument (contained in *Murdock*) that a state may not tax a privilege which it may not withhold. Thus, JSM appears to concede that *Complete Auto* eliminates its earlier erroneous argument that California's sales tax is unconstitutional because it is denoted as a "privilege" tax. (See JA 238-39.)

Complete Auto held that where a tax measured by income is proper (there against interstate commerce activities), such a tax is not invalidated because it is denoted as a "privilege" tax; i.e., the formal designation of an otherwise proper tax as a "privilege" tax does not render it unconstitutional. Specifically, *Complete Auto* held that constitutionality of a state tax must be judged on its effect (430 U.S. at 285, 288); it is not invalid because it is called a tax on a privilege granted by the United States Constitution. While *Complete Auto* does not directly refer to *Murdock*, it does (*Id.*, at 288-289) "reject the rule of" *and overrule Spector Motor Service v. O'Connor* ((1951) 340 U.S. 602); *Spector* was the leading case applying the *McGoldrick* rule that states may not tax the "privilege" of exercising the constitutionally protected right to engage in interstate commerce. Thus, this basic rule and reasoning upon which *Murdock* relied was taken away by *Complete Auto* in 1977 when it overruled *Spector*.

The court finally said that the ordinance "sets aside the residential areas as a prohibited zone, entry of which is denied plaintiff unless the tax is paid" and concluded that such restraint (or one which is city-wide in scope) is "an abridgment of the freedom of the press and a restraint on the free exercise of religion. They stand or fall together." Thereupon, the court reversed the criminal convictions for soliciting without a license. (*Id.* at 117.)

To avoid criminal prosecution, *before* the colporteurs in *Murdock* could lawfully begin to sell their materials (as an integral part of their preaching), for 5 cents to 25 cents each [319 U.S. at 107], each had to purchase a license for $1.50 per day to $20.00 for three weeks [319 U.S. at 106], whether or not he ever sold enough to pay the license fee – a truly oppressive limit on freedom of speech and religion. (The California tax here is entirely different. It is payable only after sales have been made and at a small [generally 6] percent of the money already received by JSM; here there is no restraint whatsoever on any religious activities, but merely [like the concededly constitutional income taxes which could have been collected from the *Murdock* preachers] a small diminution in the proceeds available to the seller.)[18]

The *Follett v. McCormick, supra,* 321 U.S. 573, facts were substantially the same as those in *Murdock* except

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[18] The use tax here is an obligation of the purchaser, which can be collected by JSM from its purchasers. (R & T Code, §§ 6202, 6203.) Thus, the use tax here places no direct financial burden on the seller (JSM) unless he elects not to collect the use tax from the purchaser (*Id.*, § 6203; *Bank of America v. State Board of Equalization* (1962) 209 Cal.App.2d 780, 792-93). JSM can also by agreement obtain reimbursement of any sales tax from its purchasers. (Cal. Civil Code, § 1656.1.)

that the flat license tax was applied to a Jehovah's Witness who was *not* itinerant but was a resident of the town (*Follett, supra,* at p. 575) where he was preaching the gospel by going house-to-house presenting the gospel of the kingdom both orally and in printed form. (*Id.* at p. 576.) The court again stated the exaction of a *prohibitive* license tax as a condition to the exercise of the great liberties guaranteed by the First Amendment was as obnoxious as the imposition of a censorship or a previous restraint (citing *Murdock*), and held that constitutional prohibition was equally applicable to the preacher who goes door-to-door in his own village as to one who preaches the gospel from the pulpit or the itinerant preacher in *Murdock*. (*Follett, supra,* at p. 577.) The court went on to say, however, that the exemption "of a preacher who preaches" from the fixed license tax before the court did not free him from taxes on income or property. (*Id.* at pp. 577-578.) (The taxes here in issue, like the permitted income tax on preachers is based on a percentage of their actual receipts; they are not a *fixed prior charge* payable before one may lawfully preach, like the unconstitutional "*Murdock*" and "*Follett*" taxes.)

Four of the judges on the Supreme Court dissented in 1943 and 1944 in *Murdock* and *Follett*, believing that it was constitutionally permissible to impose a license tax on the act of selling religious literature. (See opinions of Reed, Roberts, Frankfurter and Jackson.) Subsequent Supreme Court decisions support the dissent in this respect.

B. Subsequent Cases Severely Restrict *Murdock* and *Follett* and Uphold General Taxes (Like Those Here) Applied To Activities Related To Practice of Free Speech and Religion.

In more recent cases, this Court on different facts has adopted the *reasoning* of the dissents in *Murdock* and

Follett, has refused to expand application of the general statements of the *Murdock* five-judge majority in those cases, and has refused to expand the limited tax immunity created by them.

1. By 1947, the California Supreme Court held that the same type of literature which was involved in the *Murdock* case (that of Jehovah's Witnesses) was not excused by the First Amendment from the general California Personal Property Tax. (*Watchtower B. & T. Soc. v. County of L. A.* (1947) 30 Cal.2d 426.) This holding was affirmed in federal courts, and this Court refused to overrule this decision. (*Watchtower Bible & Tract Soc. v. Los Angeles County* (C.D.Cal. 1949) 84 F.Supp. 352, affd. (9th Cir. 1950) 181 F.2d 739, cert. den. 340 U.S. 820.) Thus, it is clear that the imposition of added burdens of a property tax imposed directly upon the very literature used in exercising one's religion and freedom of speech does not offend the First Amendment.

2. In *Braunfeld v. Brown* (1961) 366 U.S. 599, 606, the Supreme Court stated that to strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the Legislature. The Supreme Court observed that the regulation in question in that case operated to make the practice of one's religious beliefs more expensive but it did not face them with a choice of forsaking their religious practices. (*Id.* at 605.) The list of legislation of this nature is nearly limitless.

3. In 1981, in *United States v. Lee* (1982) 455 U.S. 252, the court held that an Amish farmer must pay social security system taxes even though this was forbidden by

his bona fide religious beliefs and was a direct interference with the free exercise of his religion. (*Id.* at 257.) The court held that because of the "broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." (*Id.* at 260.) Here, there is no direct interference with practice of religion (merely small financial cost of administering and paying those amounts JSM chooses not to collect from the purchasers). However, *Lee* illustrates that even direct interference by a tax with religion *may be permitted* because of government tax needs.

4. In 1983, this court held that imposing a *special* tax which *singled out* certain members of *the press,* violated the First Amendment where the state did not establish counter-balancing public interest justifying *differential* taxation. (*Minneapolis Star v. Minnesota Comm'r of Rev., supra,* 460 U.S. 575.) There, Minnesota had but did not impose a complimentary Sales and Use Tax Law similar to that in California. The court observed that states *can* subject newspapers to *generally applicable* economic regulations without creating constitutional problems, but Minnesota had not chosen to apply its *general* complementary *Sales and Use Tax* to newspapers. The court suggested that the framers of the First Amendment were concerned with governmental use of "differential taxation" (as opposed to the power to tax generally) as a powerful governmental weapon against the taxpayer who was differentially taxed (*id.* at 585) and suggested that the state could tax businesses generally (citing *United States v. Lee*) without creating First Amendment problems. (*Minneapolis Star v. Minnesota Comm'r of Rev., supra,* 460 U.S. at 586).

The court further observed that:

"The tax is, according to the State, merely a substitute for the sales tax, which, as a generally applicable tax, would be constitutional as applied to the press.[9] . . .

"[Footnote] 9. Star Tribune insists that the premise of the State's argument – that a generally applicable sales tax would be constitutional – is incorrect, citing *Follett v. McCormick*, 321 U.S. 573 (1944), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Jones v. Opelika*, 319 U.S. 103 (1943). We think that *Breard v. Alexandria*, 341 U.S. 622 (1951), is more relevant and rebuts Star Tribune's argument. There, we upheld an ordinance prohibiting door-to-door solicitation, even though it applied to prevent the door-to-door sale of subscriptions to magazines, an activity covered by the First Amendment. By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. *Follett, supra*, at 576-578; *Murdock, supra*, at 112, 113-114; *Jones v. Opelika*, 316 U.S. 584, 609, 611 (1942) (Stone, C. J., dissenting), reasoning approved on rehearing in 319 U.S. 103 (1943); see *Grosjean v. American Press Co.*, 297 U.S., at 249; see generally *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible, *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972) (dictum); *Grosjean v. American Press Co., supra*, at 250 (dictum); cf. *Follett, supra*, at 578 (preacher subject to taxes on income or property) (dictum); *Murdock, supra*, at 112 (same) (dictum)." (*Id.* at 586-587.)

The foregoing footnote makes it clear that the 1983 Supreme Court believed that the *Murdock/Follett* cases are inapplicable to a generally applicable sales tax, i.e., a tax based upon the sales price collected when property is sold. The Minnesota general Sales and Use Tax under discussion there, is in substance the same as the California Sales and Use Tax in issue here.

5. On March 24, 1986, this Court dismissed an appeal for want of a substantial federal question in the case *Covenant Community Church v. Lowe* ((1986) ___ U.S. ___ [89 L.Ed.2d 710, 106 S.Ct. 1451]; hereinafter *"Covenant"*) and thus approved[19] the 1985 decision of the Supreme Court of Tennessee in that case (698 S.W.2d 339) which upheld against First Amendment objections a five percent *privilege* tax paid by a church (through the property owner) for the occupancy of motel rooms each Sunday *exclusively for religious worship and instruction.*

The Tennessee Supreme Court's observation that "the religious use to which the rooms are put is irrelevant to the imposition of the tax," (698 S.W.2d at p. 342) is equally applicable to the generally applicable sales and use taxes here based on the secular acts of selling, storage or use for any purpose in California. The California sales tax is on selling tangible personal property at retail and the California use tax is on any storage or use in California. Neither is a tax directed at or imposed on any religious function.

California's sales and use taxes, which are collected from receipts after the religious materials are sold at retail for use here (and which can be reimbursed from the

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[19] Such a dismissal affirms on the merits. (*Hicks v. Miranda* (1975) 422 U.S. 332, 344.)

purchaser), are less a burden and direct tax on a "core" or integral religious function than the general tax on occupancy of space in a motel was in *Covenant* where that *tax had to be paid by a church for occupancy every Sunday exclusively for religious worship and instruction*. SBE submits that the *Covenant* ruling is consistent with language quoted hereinabove from *Minnesota Star* indicating that a generally applicable nondiscriminatory tax imposed on secular acts, e.g., sales, use, storage, or occupancy, is not unconstitutional simply because the taxed activity may be part of a speech or religious activity.

6. This court's decision in *Texas Monthly* ((1989) 109 S.Ct. 890) earlier this year shows the need for a decision here clarifying the scope and effect of the *Murdock* and *Follett* cases. In that decision the plurality followed the *Minneapolis Star* lead, rejecting "unnecessarily sweeping statements" in *Murdock* and *Follett* and limiting their holdings to situations where the facts before the court clearly showed that the law as applied clearly *prohibited* free exercise of religion. (103 L.Ed.2d at 17-20.) On the other hand, Justices Blackmun and O'Connor felt that "defining the ultimate scope of *Murdock* and *Follett* may be left for another day" (*Id.*, at 22); Justice Scalia said those cases were "narrowly distinguishable" though not as "readily distinguishable as Justice Brennan suggests." (*Id.*, at 30); and Justice White discussed only the "Press Clause" (*Id.*, at 20).

7. On June 12, 1989, this court in *California Equalization Bd. v. Sierra Summit* 490 U.S. ___, 104 L.Ed.2d 910, threw out an old distinction between cases upholding "a tax on a government agent's property and [prohibiting] a tax imposed on its operations" (104 L.Ed.2d at 916) and held that the "nondiscriminating" California sales and

use tax here in issue must be paid on liquidation sales by bankruptcy trustees (even though it placed a financial burden on the court's liquidation process – the same burden from which JSM here requests constitutional immunity). The court's comment that "whatever immunity the bankrupt estate once enjoyed from taxation on its operations has long since eroded and . . . there is now no constitutional impediment to the imposition of a sales tax or use tax . . . " (*Id.*, at 917) should be equally applicable to sales by persons exercising their First Amendment freedoms of speech, press, or from prohibition of free exercise of religion.

There is no reason or justification for a general rule prohibiting the sales and use taxes here because they impose a financial and administrative burden on persons or organizations engaged in religious activities. Here the tax is only 6% of JSM's receipts and can be passed on to its purchasers; and the courts below have held that the evidence presented does not establish unconstitutional entanglement.

Apparently JSM as well as this Court recognizes that income and property taxes are not prohibited by the First Amendment. There is no significant constitutional distinction between either of these constitutionally permitted taxes and the California sales and use taxes, that would justify constitutional prohibition of the latter.[20]

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[20] Both the incidence and burdens are quite similar between income and sales taxes and between use and property taxes. Both California's income and sales taxes are based upon the income or receipts of the seller; the distinctions are that certain expenses of the selling are deducted in determining the amount subject to income tax, and while gross receipts taxes

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C. "Core Activities" Are Not Exempt From Fair Secular Non-Discriminatory Taxes.

Brief for the Appellant (24 to 31) argues that government may not tax "the dissemination of religious doctrine." JSM calls "the religious interactions between a religious organization and its adherents" "core activities" (B of A 26) which it asks this court to declare immune from taxation. (*Id.* at 31.) This court should reject this contention. There is nothing in the Constitution justifying it. Also, a great entanglement and close examination of "religious" and philosophical activities will be required to determine what is "core" as JSM has defined it; income, property and other taxes have been approved on what are probably core activities; and SBE has not taxed any "core" activities here.

JSM concedes that "the legitimacy of free exercise exemptions presupposes that the protected category be defined broadly enough to encompass nontheistic (even atheistic) opinions about 'religious' subjects, including 'such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong'" (*Id.* at 47),

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are on a higher measure [gross receipts without deductions]; the income tax during this period went up to rates (11%) substantially above the 6% sales tax rate.

The California use tax is imposed upon the first storage of or other exercise of any right of ownership over property in California. The property tax in the *Watchtower* case (discussed in sub-heading 1, *supra*) was also upon ownership of religious literature stored by a religious organization in California for the purpose of distributing it in furtherance of religious activities. (While California's property tax is at a lower rate, it is imposed each year upon the fair market value of the property, while use tax is imposed only once upon the purchase price.)

and exemptions must be extended to "philosophical literature distributed by nonreligious organizations devoted to these matters." (*Id.* at 23.) Thus, it would appear that "core" speech activities of non-commercial organizations and individuals designed to promote the moral, philosophical, environmental, educational, literary, and scientific well being of the world would be entitled to the same constitutional protection as JSM. How could one possibly determine what is "core" of such non-commercial activities?[21] It is one thing for the state to draft such an exemption encompassing a broader array of activity that would survive a challenge under the Establishment Clause, but it is something else to impose it upon the State on the basis of the Free Exercise Clause. (*Texas Monthly, supra,* 109 S.Ct. 890; Blackmun and O'Conner concurring, p. 906.) Justice Rehnquist, dissenting in *Thomas v. Review Board* (1981) 450 U.S. 707, 723 observed that the State may grant exemptions to religious persons but it is not constitutionally compelled to do so. Similarly, Justice White, dissenting in *Sherbert v. Verner* (1963) 374 U.S. 398, 422-23 observed that the State could carve out an exemption if it wanted to but that it would not be compelled to do so under the First Amendment.

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[21] Appellant claims tax immunity here under free exercise of religion, not freedom of speech or press. Thus, core activities would refer not just to communications, but to any non-communicative activities which are "core" to matters of good and evil and other protected philosophical matters. Would not telephone calls to arrange, and transporting participants to, a rally concerning a matter of conscience (e.g. right to life/choice) or JSM's crusades be part of the "core" activities? If so, such telephone calls and the fuel and vehicles used exclusively for core activities would, (under JSM's argument) be immune from communications, fuel, property and licensing taxes.

The plurality in *Texas Monthly v. Bullock, supra,* 109 S. Ct. 890, 905 concluded that the type of taxes in issue

> " . . . would not subject religious organizations to undue burdens and the government's interest in their uniform application is far weightier."

The court in *Hernandez v. Commissioner of Internal Revenue* (1989) 109 S.Ct. 2136, 2149, stated that with respect to disallowance of a deduction that

> " . . . our decision in *Lee* establishes that even a substantial burden would be justified by the 'broad public interest in maintaining a sound tax system'. . . ."

State Board of Equalization submits that a 6% reimbursable tax certainly is not a substantial burden, and even if it were, the state's interest in uniform application (not raising revenue as contended by JSM) of the tax justifies the burden.

This court in *Bowen v. Roy* (1986) 476 U.S. 693, stated that "the Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." (*Id.*, at 699.) The court further observed that "the Free Exercise Clause affords an individual protection from certain forms of government compulsion . . . " (*Id.*, at p. 700.) More recently, this court in *Lyng v. Northwest Indian Protective Ass'n.* (1988) 485 U.S. ___ ; 108 S.Ct. 1319, 1326) stated "the crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government' [Citation]."

The sales and use tax does not impair a religion's or its adherents, freedom to believe, express or exercise a

religion. Just as the disallowance of the deduction in *Hernandez* would leave the church or the adherent with less money, similarly, the sales and use tax would have the same effect. This economic cost does not prohibit an adherent's ability to exercise freely his religious beliefs.

Even were there a "core" exemption, the activities here in issue would not qualify. The proposed protected "core" activities are the central practices of religion (e.g., prayer, sacraments, participating in religious ceremonies). Ministries refers to the "preaching." Preaching is the speaking and listening, the transmission of the actual religious thought from the minister to the ministered. This is not taxed by the California sales and use tax law. These taxes fall on either the sale or the initial storage – some time before there is any religious use of the materials purchased.[22] Further, the "core" of JSM's religion

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[22] JSM has not proven that all or any portion of the religious literature involved here was in fact ever used in any core religious activity by anyone, or that any of the purchasers were in fact "adherents." JSM has admitted that the merchandise sold at the crusades was not distributed for use in the crusade meetings or any other activities of appellant; nor was the mail order merchandise. (Exh. 55, JA 203, 204.) If a sale of literature or recordings which might or probably would, be used in religious ceremonies is constitutionally exempt from tax, why should JSM not be immune from a tax on transportation of those items to the purchaser or on the manufacture thereof, on the raw materials used therein or a property tax or income tax thereon? If the sales and use taxes here are prohibited, why should not use by JSM of its religious radio stations, of telephones exclusively to communicate religious messages and airplanes and trucks to take people and equipment to crusades (including fuel used for such travel) be exempt under the free exercise clause from all federal, state and local taxes? Why should not all taxes affecting any philosophical communication then be subject to "free exercise" attack?

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appears to be its "Tenets of the Faith" (JA 110-20). Little of the merchandise sold by JSM (see 8-9, *supra*) deals directly with this "core."

III

JSM FAILED TO ESTABLISH EXCESSIVE ENTANGLEMENT OR ANY UNCONSTITUTIONAL BURDEN

Although JSM presented no facts at the administrative level (and thus should be precluded from doing so in court) it presented extensive testimony of a Texas CPA at trial which it contends establishes that the administrative burden of sales taxes will be intolerable and therefore the California sales tax here should be held unconstitutional under the establishment clause. The California courts rejected this testimony and accepted conflicting primarily documentary evidence to the contrary. (JA 245-252.)

There was and should be no substantial burden in reporting California sales and use taxes. Taxes for the years in issue are agreed to (based on a percent of amounts clearly recorded by JSM in its own records as

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It also should be noted that the taxes assessed against amicus ISKCON occurred before any possible religious use because the sales tax was only on sales of books between Krishna corporate entities in California for future distribution at airports and the use tax was only on the cost of books purchased out-of-state and later distributed at airports. The SBE determined that the distribution of books at airports was not a sale since no fixed prices were set and therefore the respective Krishna corporate entities were consumers of the books given away and owed sales tax if purchased in California or use tax if purchased out-of-state.

"sales").[23] By 1981, JSM was an expertly staffed business-type computerized operation which claimed that it segregated sales from donations for income tax reasons.[24] SBE

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[23] Appellant's in-house CPAs (and computers since 1978) maintained separate accounts for various types of sales including specific retail sales, crusade sales and other accounts. (JA 154.) The CPA who prepared appellant's reports up to 1978 clearly segregated four types of sales and two types of donations. (JA 155.) Other documents in evidence showed that JSM segregated sales from donations for many purposes. (JA 251, fn. 17.) Only Appellant's CPA expert witness who prepared JSM's annual report after 1979 had problems in segregating sales from donations. He testified (JA 154) that he had some reservations and could not certify the segregation in his annual audit reports beginning in 1979 of "contributions" from "sales" because *some sales may have been included in the contribution accounts.* (JA 171-172.) He did not know if any of JSM's in-house accountants had tried to remove from JSM's "donations" accounts the amounts which he felt were really sales. (JA 163.)

[24] By June of 1981, JSM "brought in a team of computer experts" to assure that its computers would "process all items so that we know at all times exactly what you have asked for, how it is being processed, and when it is being shipped"; "To give you a year-end receipt for all your giving for the past year for income tax purposes"; and to assure that "the amount on the receipt be correct, even specifying (if need be) what the donation is for"; appellant estimated it would "take several months to work it out." (Exh. 15, June 1981, p. 23.)

Under federal income tax law, amounts paid for JSM's merchandise are not deductible; and further the fair value of items received from JSM upon making any "donations" must be subtracted to determine the amount of donation that may be deducted for income tax purposes. JSM's reports of donations for income tax purposes, *necessarily* separated out the FMV of items "sold," so this information was already in JSM's computers after 1981. (See *Hernandez v. Commissioner of Internal Revenue* [1989] ___ U.S. ___, 109 S.Ct. 2136.)

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simply collects a uniform six percent tax on mail order sales for use in California. There was and is no substantial burden in reporting the California mail order sales in the manner done for the period in issue, or in requesting JSM to add up and separately report the total sales made at each California crusade location.

This court's recent *Hernandez* decision (*Hernandez v. Commissioner of Internal Revenue, (supra)*, ___ U.S. ___, 109 S.Ct. 2136, decided June 5, 1989) makes it clear that for income tax purposes donations to religious organizations must be separated from purchases from religious organizations. JSM claimed in 1981 to be establishing computerized methods of providing to each "adherent" the amounts of its contributions to aid the adherent in taking its income tax deductions. (See fn. 24, *supra*.) This is the

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JSM did not need to hire more personnel; it already had expert accounting and tax personnel. This included witness Guinn, a highly paid Texas CPA, as well as in-house accountants and Mr. Treeby's highly paid law firm. Appellant's "Stewardship Department" claimed extensive expertise in taxes and related financial matters. JSM claimed it had "Stewardship Department Representatives" in at least six states including California who help subscribers to:

> "avoid all capital gains set up a plan that will pay you a higher income later in life when you need it more . provide income for another individual . remove or worries of investment counseling.
>
> "[and provide information] on income tax savings, the elimination [or] reduction of estate taxes, and the assurance that your money is spreading the Gospel around the world, while being administered by the professional services of the Jimmy Swaggart Ministries' Stewardship Department. . . ." (Exh. 15, June 1981, p. 16.)

same information which JSM here argues it does not have and cannot get without huge expenses.

Any organization which wants to segregate sales from donations can do so in a reasonable and not a financially burdensome manner which will be acceptable to and comply with the statutory and regulatory requirements of the California State Board of Equalization. SBE submits it is only an organization which tries to create the appearance of an intolerable burden in order to avoid paying a tax that will assert that it is unable to reasonably accommodate the needs of the California taxing authorities without an undue and unreasonable entanglement of tax administration in religion. Paying California sales and use tax did not here and will not create any substantial administrative burden, let alone any "entanglement."

JSM's concerns regarding the potential of complying with hundreds of different tax rates is eliminated by its concession that during the period in issue, only California (with a single rate and law [JA 176]) taxes JSM mail order sales outside Louisiana (B of A 13-14). SBE further submits that today's computer technology and the present extensive and expensive accounting talent already paid by JSM should be able, with a relatively small amount of time and cost, to incorporate any necessary sales and use tax reporting requirements into its current computerized mail order sales business activities. The uncontroverted evidence in the record simply does not support JSM's excessive entanglement claims.[25] JSM and many of its supporting amici contend that the burden of

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[25] JSM tries to sidestep the effect of the *Hernandez* case by saying that a deduction differs from a tax. Of course it does.

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collecting the tax would lead to recurring, intricate and intrusive interactions between religions and government officials which would raise inhibiting and entanglement problems under the Free Exercise and the Establishment Clauses, respectively. (B of A 35.) This argument is not supported by any evidence in the record and is just wrong.

JSM contends that the apparent burden (administrative cost)[26] of collecting the tax will chill or inhibit religious organizations from entering a state to conduct religious activity or it will cause religion to curtail certain programs due to having less money after paying costs. Even were this true, would it invalidate a neutral, nondiscriminatory tax? Certainly not; or every tax would be invalidated for having substantial economic bu.dens which may affect one's action. The free exercise is not offended when a tax burden could affect one's choice of

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However, any individual contributing to a religious organization will want to be able to deduct that contribution for income tax purposes. Conversely, any religious (or other charitable) organization soliciting donations will certainly wish to provide its donors with the necessary information to allow the donor to take a proper deduction, if for no other reason than to induce greater donations. JSM claimed in 1981 it was already separating out donations for each individual, and can use this same information for use tax purposes. Surely JSM intends to do so in the future.

[26] Amicus Watchtower (p. 5) suggests that the potential of every adherent obtaining a permit would be burdensome. California addresses this situation by treating the umbrella organization of the canvassers or door-to-door ministers in this situation as the retailer (rather than each individual) for sales and use tax purposes. (R & T Code, § 6015.)

conduct. (Only when it makes one choose between violating a religious tenet or a government requirement, need the tax be justified under *Lee*.) It apparently does not invalidate income, property, employment, transportation, gasoline and other taxes collected regularly from persons engaging in religious activities.

This court in *Bob Jones University v. United States* (1983) 461 U.S. 574, 603-604, wnich involved the exempt status of a religious school, stated that "denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing religious tenets." There is no evidence that any burden from California's sales and use tax would be substantial, let alone prohibit any one from practicing his or her religion or prohibit JSM from conducting its programs. (JSM paid substantially more for luxury cars and airplanes, executive salaries, and in "loans" to the Swaggart family than for California taxes ([Trial Exh. 51, 52].) JSM showed no adverse effect on its "core" activites from the taxes here.)

JSM's concerns regarding entanglement are similarly overstated. This court held in *Tony & Susan Alamo Foundation v. Secretary of Labor* (1985) 471 U.S. 240, 305-06 that the Establishment Clause does not exempt religious organizations from such secular government activity as fire inspections and building and zoning regulations. The court went on to hold that " . . . the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs."

Any requirements associated with the sales and use taxes are the same for any organization and since any

compliance burdens are imposed and operate evenhandedly, they are not constitutionally impermissible. (*Larson v. Valante* (1982) 456 U.S. 228, 253.) This court held in *Hernandez* that the application of neutral tax laws to religious groups does not cause impermissive entanglement in religion. (109 S.Ct. at 2147-48.)

JSM's claims of potential entanglement due to alleged disputes over donative intent, selective enforcement and misconduct of government agents are unsupported by the record and are improper. JSM and its amici attempt to raise these concerns to a level of continuous onsight monitoring disfavored by this court. The facts just do not support such conduct.[27] This court in

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[27] JSM expressed concerns about agents of the state (B of A 41), as did two amici briefs (Association for Public Justice 17) and National Council of Churches regarding alleged conduct of SBE auditors regarding an ISKCON audit. The audit discussed (1980) was not even part of the ISKCON action now pending in the California Court of Appeal which involves the years 1973-1979. (See ISKCON Amicus Brief, pp. 4-5.) It is unknown whether these allegations are correct, and obviously only their version is being presented. There is no evidence in the record concerning these allegations, and accordingly they should be disregarded.

JSM's claim (not found in the record) that SBE auditors spent "2-3 weeks" on this (B of A 37, fn. 42) is far from "continuous oversight" and is no unusual burden on a business type organization of the nature and type JSM was.

JSM's extensive discussions of taxes used as "device[s] for the suppression of religious minorities" and implications that it was a threatened, unpopular, itinerant minister (B of A 11-13, 35, 41-42) have no place in this proceeding. The record clearly shows otherwise, i.e. it is JSM that is seeking special tax immunity not given by California to anyone, including small itinerant and large established religious organizations like JSM

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Hernandez disposes of any problems regarding determination of donation versus sale (109 S.Ct. at 2147-48). This analysis is similarly applicable here. The SBE never followed the Attorney General Opinion (JA 26) which found the sales and use tax unconstitutional on the facts in that opinion and which is not even followed by the Attorney General today. (See fn. 16, *supra.*)

Finally, some amici have hinted that sales and use taxes violate the Establishment Clause because they create a preference to those religions that do not raise money through selling books. This court in *Bob Jones University v. United States, supra,* 461 U.S. 574, 604 n.20, observed that a secular regulation does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions. This court in *Hernandez, supra,* 109 S.Ct. *2147,* recently rejected a similar preference contention regarding the disallowance of a deduction. For the same reasons, the preference contention must be rejected here.

IV

THERE ARE NO NEXUS PROBLEMS HERE

A. Nexus Should Not Be Considered.

The California courts specifically ruled that JSM did not properly raise the question of Nexus and declined to

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(which was related to Assemblies of God – JA 108-09). SBE's requests to register were proper (see fn. 7, *supra.*) There is no evidence of any selective enforcement against JSM or between established religions and less conventional ones. The California sales tax and use tax have been in existence since 1933 and 1935, respectively, and have been applied uniformly to all religions and others. (JA 22.)

rule on that issue. (JA 252-255.) Nexus is not an issue properly before this court and should not be considered.

B. Activities in California Conceded by Plaintiff Show Sufficient Nexus to Require Collection and Remittance of Use Tax by Appellant as Seller.

California clearly has jurisdiction to tax sales made in California at crusades.[28]

JSM averaged over three crusades a year with $10,000 merchandise sold in two to three days of selling at each such crusade. Appellant asserts (incorrectly) that it had "no other contact with California other than the crusades described [above] and the mail order sales," except a representative from 1978 through 1981 "counseling adherents." (B of A 36.)[29] The evidence presented in

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[28] Appellant sold $240,000 worth of merchandise at its crusades in California. JSM brought these goods here in its own trucks, displayed them for sale, delivered them to customers and collected payment, i.e., performed the entire sales transaction for each item in the State of California. Appellant concedes that California has Nexus (jurisdiction to tax) (B of A 16).

[29] Even were the foregoing the only contacts with California (which they are not), they would be sufficient to require collection of the use tax on mail order sales. The most recent, leading and factually closest case is *National Geographic Society v. Cal. Equalization Bd.* (1977) 430 U.S. 551 (hereinafter *"National Geographic"*). The mail order sales in *National Geographic* (also a "nonbusiness" public benefit corporation) and here, appear to have been conducted in similar respects. In addition, *National Geographic* had only two advertising offices in California which had nothing to do with its mail order sales. This was held sufficient nexus to require collection of use tax by National Geographic on the mail order sales. Here, there was admittedly

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this case shows substantially more extensive California contact.[30]

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at least one representative of the seller who was in California as such for at least four years. Being a permanent resident of California, he necessarily had a California office or place of business from which he operated. There appears to be no substantial difference between having one or two non-selling offices in a state; each had a continual presence here and was enjoying substantial benefits of this state; the results should be the same here as in *National Geographic* on the basis of these facts alone. However, there were substantial additional contacts by appellant here with California which were not considered in *National Geographic*.

[30] Some of the musical tapes and speeches which were sold by JSM were recordings of events at the crusades themselves (JA 20); thus some of the recordings sold to Californians were recorded here. At the crusades there were solicitations of sales (JA 20, 54); the same items were sold both at crusades and by mail order (B of A 7); thus the crusade activities also constituted intrastate activity in California soliciting mail order sales to persons attending the crusades (and to Californians listening to intrastate live broadcasts of California crusades). JSM's broadcasts (which include solicitation of sales) were made through local California stations, including *cable* television stations located throughout California. (Exh. 15, June 1981, p. 15.) (Cable television is obviously intrastate and extensively uses local California cable television distribution facilities. Users of local television (especially cable) enjoy substantial locally provided governmental benefits for which California may request payment of taxes.)

Appellant's crusade caravans brought into California, displayed and sold here on a recurring basis the same merchandise which it was simultaneously offering to its customers by mail order activities; thus, JSM's crusade sales activities complemented, aided and stimulated its mail order sales and vice versa.

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The court in *National Geographic* points out that "states necessarily impose the burden of collecting the tax on the out-of-state seller; the impracticality of its collection from the multitude of individual purchasers is obvious." (*National Geographic v. Cal. Equalization Bd., supra,* 430 U.S. at p. 555.) After citing *Standard Pressed Steel Co. v. Washington Rev. Dept.* ((1975) 419 U.S. 560, which found nexus where a single consultant was present in the state) and other cases upholding nondiscriminatory

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Appellant's presence in California for crusade purposes was obviously not limited to the two-to-three day crusade dates, as appellant implies. Advance personnel arranged for crusade locations, hotels, contacts with local churches and clergy, advertising and other arrangements. (JA 67-68.) Extensive equipment was trucked into California and set up in advance of crusade dates; it was taken down later and moved to other crusade sites within California. (JA 20.) This shows not only substantially longer periods that appellant's employees were actually present in California in connection with crusades at which sales were made, but that there was a substantial and extensive use of local California facilities such as large auditoriums, police assistance for large meetings, utilities, highways, and local advertising media to publicize the crusades to local persons.

One of appellant's witnesses testified that when he was a minister of a local church in Florida, he was a representative of appellant also (JA 92); and after he became JSM "crusade director" he would "go to" the crusade location, talk to pastors of local churches, set up all the different chairmen and ministries involved in that crusade (JA 67-68); this suggests that local ministers and other California residents performed extensive representation of appellant here for purposes of arranging the crusades in California at which JSM sold substantial amounts of merchandise to persons who through such activities came to the sales locations (the entry ways through which attendees must pass to and from the meetings). (See Brief of Amici MTC, et al. for further detail.)

direct taxes fairly related to the services provided the out-of-state seller, the court said that the basis for imposing on an out-of-state seller,

> " . . . a duty to collect a use tax is even stronger. [citing] The out-of-state seller runs no risk of double taxation. The consumer's identification as a resident of the taxing State is self-evident. The out-of-state seller becomes liable for the tax only by failing or refusing to collect the tax from that resident consumer. Thus, the sole burden imposed upon the out-of-state seller by statutes like §§ 6203 and 6204 is the administrative one of collecting it. [Citations]" (*National Geographic v. Cal. Equalization Bd., supra,* 430 U.S. at p. 558.)

The court then distinguished two cases which had found insufficient nexus, (a) saying in *Nat. Bellas Hess v. Dept. of Revenue* ((1967) 386 U.S. 753), there was absolutely no contact with the taxing state other than interstate mail order activities initiated from outside the taxing state; and (b) distinguishing *Miller Bros. Co. v. Maryland* ((1954) 347 U.S. 340), on the ground that the seller could not know whether the goods sold over the counter in Delaware were transported to Maryland (the taxing state) prior to their use. (*National Geographic v. Cal. Equalization Bd., supra,* 430 U.S. at 559.)[31]

The test stated in *National Geographic*:

> " . . . is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between [the state] and *the person* . . . it seeks to tax.'" (*Id.* at 561.)

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[31] A concurring opinion in *National Geographic* suggested that the *Miller Bros.* case be overruled. (*Id.* at 563.)

Such minimum connection clearly exists with JSM under the facts conceded and evidence presented in JSM's offer of proof. This, plus evidence which came from its witnesses and documents clearly show sufficient nexus exists.

JSM in its brief (A of B 18-19) contends that the effect of the use tax is similar to a fine apparently due to the magnitude of the use tax assessed in this case – $104,000. This is unsupportable because the use tax is 6% of the sales price and thus the $104,000 relates to mail order sales of $1,702,842 made in California and not to the sales receipts of $240,650 from the sales made at crusades in California. (JA 226.) There is no factual or legal relationship between the total use tax assessed on mail order sales and the value of material sold at crusades in California and any comparison is misleading and erroneous. Use of the crusades and other contacts as a nexus for use tax collection is not functionally identical to a flat license fee either factually or legally. This court in *Standard Pressed Steel* (*supra*, 419 U.S. 360, 564), held that a tax on gross receipts from sales to a local consumer is apportioned exactly to the activities taxed. This is exactly what the use tax is in this case.

If for any reason this court should choose to consider the question of Nexus and decide that the facts before it constitute insufficient Nexus, the Court should remand the case to the trial court to enable SBE to engage in necessary discovery to determine the remaining facts on this subject and present them at retrial to the trial court.

CONCLUSION

The issue properly before this court is simply the legal question whether the California sales and use taxes which fall upon sales by religious organizations of religious content materials are an unconstitutional prohibition of the free exercise of religion, under the broad language of *Murdock* and *Follett* (which have been so interpreted by some). This court should clearly indicate that sales and use taxes may be collected on sales by religious organizations of any tangible personal property, including tapes, books and records with religious content, both generally and as applied to JSM here. Other contentions made by JSM in its brief neither raise substantial federal questions properly before this court nor are they grounds justifying reversal of the decision below.

It is respectfully requested that the decision of the Court of Appeal be affirmed.

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Respectfully submitted,

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